Supreme Court, U.S.
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No. 10-118

In The
Supreme Court of the United States

DAWN GEORGETTE MYERS,

Petitioner,

v.

CENTRAL FLORIDA INVESTMENTS, INC., *et al.*,

Respondents.

ON CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Plaintiff's Seventh Amendment argument was properly preserved.

II. Whether the Eleventh Circuit's Opinion, that the District Court correctly capped Plaintiff's punitive damages at $500,000, violated the Seventh Amendment where the jury failed to find that Defendants specifically intended to harm plaintiff and did in fact harm plaintiff, and where the amount of the jury's punitive damages award exceeded that permitted by law.

III. Whether the Eleventh Circuit's Opinion, that the District Court correctly capped punitive damages at $500,000, was further supported under a federal due process analysis.

IV. Whether the Eleventh Circuit's Opinion, that the District Court did not abuse its discretion by finding that defendants' affirmative defenses were sufficiently particular in denying the timeliness of plaintiff's EEOC complaint, violated the Seventh Amendment or ran afoul of the Federal Rules of Civil Procedure.

V. Whether the Eleventh Circuit's Opinion, that the District Court did not abuse its "considerable discretion" by prohibiting Plaintiff from introducing evidence on rebuttal, which did not "explain, repel, counteract, nor disprove" testimony offered by Defendants' witnesses, violated the Seventh Amendment.

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here are Petitioners David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; Westgate Resorts, Ltd.; Westgate Lakes, Inc.; and Westgate Lakes, Ltd. (collectively "Defendant"); and Respondent Dawn Georgette Myers ("Plaintiff").

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioners, David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; and Westgate Resorts, Ltd., identify Central Florida Investments, Inc.'s parent corporations as the David A. Siegel Irrevocable Trust (99%) and the David A. Siegel Revocable Trust (1%); and identify Westgate Resorts, Ltd.'s parent corporations as Central Florida Investments, Inc. (99%) and the David A. Siegel Irrevocable Trust (.5%). Petitioners further state that there is no publicly held company owning 10% or more of the stock of any of the foregoing entities.

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STATEMENT OF THE FACTS

A. Factual Background

Plaintiff sued her former employer, Central Florida Investments, Inc., ("CFI") and its CEO, alleging various wrongs, including federal and state statutory claims for sexual harassment and a common law battery claim. (App. 13a).[1]

Ultimately, Plaintiff tried her harassment and battery claims. (App. 15a). During the trial she testified to conduct spanning the entire period of her employment with CFI, dating from early 1995 and ending in 2000. (App. 3a-13a).

On her Title VII claim, the jury found that none of the alleged acts of harassment took place on or after September 15, 2000, the point at which the statutory limitations period barred recovery. (App. 15a). On her battery claim, the jury found that two acts Plaintiff testified to occurred within the statute of limitations, in a 117-day period. (App. 16a). The jury awarded Plaintiff $102,223.14 in compensatory damages and $5,276,640 in punitive damages. (App. 16a). The District Court entered judgment on the verdict in that amount. *Id.*

After hearing post-trial motions, the District Court entered an Amended Judgment that Plaintiff take nothing from Defendants on her claims under

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[1] Defendants adopt the Appendix attached to the Cross Petition in lieu of reproducing the opinions contained therein. However, a cursory review of the Appendix reveals obvious errors in the reproduction of the opinions contained therein.

Title VII or the Florida Civil Rights Act ("FCRA"), but that she recover $103,622.09 in compensatory damages, as well as $506,847.75 in punitive damages on her common law battery claim. (App. 17a).

B. Procedural Background

1. The District Court: Removal and Summary Disposition

Defendants timely removed Plaintiff's original action to the United States District Court for the Middle District of Florida from the Circuit Court of the Ninth Judicial Circuit of Orange County, Florida. (App. 14a).

Plaintiff thereafter filed a nine count Second Amended Complaint. The amended claims included sexual harassment under Title VII, 42 U.S.C. §2000e, *et seq.* and the FCRA, Chapter 760, Florida Statutes; retaliation under Title VII and the FCRA; retaliation in violation of the Florida Private Whistleblower Act "(Whistleblower"), §448.101-105, Fla. Stat.; and Florida common law claims of negligent retention and supervision, false imprisonment and battery, and a state statutory claim for inducement to prostitution, §796.09, Fla. Stat. (App. 14a).

The District Court dismissed Plaintiff's Whistleblower, inducement to prostitution and negligent retention and supervision claims, and eventually granted Defendants summary judgment on the remaining claims of sexual harassment and

retaliation. (App. 14a, 15a). The Court remanded the battery and false imprisonment claims to state court. (App. 15a).

2. The first appeal to the Eleventh Circuit and first Petition for Writ of Certiorari to this Court

Plaintiff appealed the summary disposition to the Eleventh Circuit, which affirmed, in part, and vacated, in part, finding principally that Plaintiff had presented sufficient evidence to get to trial on her hostile work environment claims. *Id.* The Eleventh Circuit also reinstated Plaintiff's state-law battery and false imprisonment claims. *Id.*

Thereafter, Plaintiff filed a Petition for Writ of Certiorari in this Court, challenging both the District Court's summary disposition of her statutory tangible employment action and retaliation claims and the Eleventh Circuit's ruling affirming the District Court. This Court denied Plaintiff's Petition for Writ of Certiorari in Case No. 07-660, on February 25, 2008.

3. The Post-Trial Proceedings

The parties filed various post-trial motions. While the District Court denied several of these motions, the Court determined the jury had not made the required findings under state law to support a punitive damages award greater than $500,000 and that the judgment should reflect Defendants had prevailed on the sexual harassment claim. (App. 17a).

On these bases, the District Court entered an Amended Judgment stating Plaintiff "shall take nothing" on the Title VII of the Civil Rights Act of 1964 and FCRA claims and reducing the punitive damage award by $4,776,640.00, to $500,000.00. *Id.* Augmented by interest, the Amended Final Judgment awarded Plaintiff compensatory damages of $103,622.09 and punitive damages of $506,847.75 and a total judgment of $610,469.84. *Id.*

4. The second appeal to the Eleventh Circuit and second Petition for Writ of Certiorari to this Court

Both Defendants and Plaintiff appealed the Amended Judgment to the Eleventh Circuit. *Id.* Plaintiff never argued any Seventh Amendment violation. The Eleventh Circuit affirmed the Amended Judgment in all respects, (the "Opinion"). (App. 1a-61a). Only in Plaintiff's Petition for Rehearing and for Rehearing *En Banc* ("Rehearing Petition") did she even mention the Seventh Amendment. The Eleventh Circuit denied Plaintiff's Rehearing Petition (App. 146a), as well as Defendants' Petition for Rehearing.

Defendants have filed a Petition for Writ of Certiorari in this Court in Case No. 10-35. Defendants have challenged the Opinion because it conflicts with decisions of the Second and Third Circuits because the Opinion leaves standing a punitive damages award based on time-barred conduct and because the Opinion conflicts with this Court's rulings on two of the three "guideposts" for

evaluating the appropriateness of a punitive damages award.

C. Objections to Petitioner's Statement of the Case

In compliance with Sup. Ct. R. 15, Defendants challenge the accuracy of the following statement characterized as fact in the Cross-Petition:

> Plaintiff claims that "even in post-trial motions, Defendants never mentioned the $500,000 state statutory cap that the court held to apply . . ." (Cr. Pet. p. 2).

However, Defendants' Motion for Remittitur expressly argued that the punitive damage award could not exceed $500,000 pursuant to §768.73(1)(a):

> Florida limits punitive damage awards. *See* §768.73, Fla. Stat. Abominable conduct merits three (3) times compensatory damages of $500,000, while egregious conduct motivated solely by greed, something not proven here, earns a multiple of four (4) times compensatory damages or $2,000,000. Only conduct specifically intended to cause physical injury, likewise not proven here, avoids the cap. (Doc. 252, p. 15 n.8).

REASONS FOR DENYING WRIT

I. THIS COURT SHOULD DENY THE WRIT BECAUSE PLAINTIFF'S SEVENTH AMENDMENT ARGUMENT WAS NOT PROPERLY PRESERVED.

When a petitioner fails to raise an argument before either the District Court or the Court of Appeals, this Court refuses to consider it. This is true even when the unpreserved argument is constitutional in nature. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

In *Kelco Disposal, Inc.*, a defendant appealed a District Court's order upholding a jury's $6 million punitive damages award in an antitrust case. *Id.* The Court of Appeals affirmed as to both liability and damages holding that even if the Eighth Amendment were applicable, the punitive damages awarded were not so disproportionate as to be constitutionally excessive. *Id.* In their petition to this Court, petitioners argued that the punitive damages award violated their due process rights. *Id.* at 270.

This Court held that "because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider the effect on this award." *Id.* at 277. Though *Kelco* petitioners claimed that the due process question was within the "clear intendment" of the objection it

made throughout the proceedings, this Court refused to assume that a nonconstitutional argument also included a constitutional one. *Id.*

Plaintiff has simply not preserved this new Seventh Amendment violation argument because she did not raise it in either the District Court, or in her Cross Appeal in the Eleventh Circuit. Plaintiff raised the Seventh Amendment for the first time in her Rehearing Petition. This Court should maintain this doctrine refusing jurisdiction in cases where the argument has not been preserved.

II. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S RULING THAT PUNITIVE DAMAGES SHOULD BE CAPPED UNDER FLORIDA LAW AT $500,000, WHERE THE JURY FAILED TO FIND THAT DEFENDANTS SPECIFICALLY INTENDED TO HARM PLAINTIFF AND DEFENDANTS' CONDUCT DID IN FACT HARM PLAINTIFF AND WHERE THE AMOUNT OF THE JURY'S PUNITIVE DAMAGES AWARD EXCEEDED THAT PERMITTED BY LAW.

Rule 10 of the Rules of the Supreme Court states:

> Review on a writ of certiorari is not a matter of right but judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the

> Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. As we show in the next several sections of this Brief, Plaintiff has failed to give this Court reason to exercise its considerable discretion for either reason.

This Court frequently uses its discretionary certiorari jurisdiction to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *See Braxton v. U.S.*, 500 U.S. 344 (1991). But again, as we show hereafter, Plaintiff has made no such case here.

Turning to those propositions Plaintiff vainly advances in her Cross-Petition, Plaintiff, for the third time, claims she is entitled to uncapped punitive damages, even though the jury's verdict omitted the requisite findings under Florida law to support unlimited punitive damages. Plaintiff goes to extraordinary lengths to contort and twist the law. Each of Plaintiff's claims here is based on an alleged Seventh Amendment violation. In her first claim, Plaintiff complains the Eleventh Circuit disagreed with her unfounded contention that the verdict form her lawyer approved impliedly included the missing statutorily mandated findings that were needed to support the original punitive damages verdict and that CFI's pre-verdict failure to object to a verdict form with which it was plainly satisfied waived its post-verdict challenge to the punitive damages award. (Cr. Pet. p. 3-6). However, this case presents nothing more than Plaintiff's grumblings that the jury's decision did not include the factual findings Plaintiff herself should have sought, but did not, coupled with Plaintiff's serial misapplications of properly stated rules of law. *See* Sup. Ct. R. 10.

Defendants did not seek punitive damages below – Plaintiff did. Plaintiff, not Defendants,

carried the burden below to show Defendants' specific intent to harm coupled with actual harm to Plaintiff as part of her prima facie case to overcome the statutory punitive damages cap. To accomplish this, Plaintiff needed a specific jury instruction and a specific verdict form. Not only did Plaintiff fail to ask for either, Plaintiff did not object to the instructions or the verdict form which omitted these specific findings. The jury did not make the necessary findings to overcome Florida legislature's presumption of excessiveness. The District Court and the Eleventh Circuit applied applicable Florida law and the punitive damages cap. Plaintiff now argues that she suffered a constitutional impairment when Defendants declined to object to jury instructions with which they were satisfied and a verdict form that assured them that any adverse punitive damages award would not exceed $500,000. To recite Plaintiff's argument aloud reveals its infirmity.

Under Florida law, a defendant cannot be held liable for punitive damages unless the trier of fact, based on clear and convincing evidence, finds such defendant personally guilty of intentional misconduct or gross negligence. (App. 29a). "Intentional Misconduct" means:

> (a) . . . that the Defendants had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued

> that course of conduct, resulting in injury or damage.

Id. (citing to §768.72(2), Fla. Stat.).

The Eleventh Circuit correctly ruled that the District Court was empowered to remit the punitive damages award if it determined it was unreasonable. (App. 30a) (citing to §768.73(1)(d), Fla. Stat.). Florida's courts are required to conduct this review in order "to make certain that the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct. (App. 30a) (citing to *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1263 (Fla. 2006)).

Under Florida law, punitive damages also are subject to a statutory cap: "an award of punitive damages may not exceed the greater of: 1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or 2. The sum of $500,000." (App. 30a) (citing to §768.73(1)(a), Fla. Stat.). For a punitive award greater than $500,000 a Florida jury must have determined and rendered specific findings that: "at the time of injury the Defendants had a specific intent to harm the claimant and determines that the Defendants' conduct did in fact harm the claimant, there shall be no cap on punitive damages." (App. 32a) (citing to §768.73(1)(c), Fla. Stat.) (emphasis added). A legitimate object of §768.73 is to discourage punitive

damages claims. *Gordon v. State*, 608 So.2d 800, 801 (Fla. 1992).

A plaintiff generally has the burden to prove each material fact essential to recovery. *Smith's Bakery, Inc. v. Jernigan*, 134 So.2d 519 (Fla. 1st DCA 1961). This burden never shifts. *Sabatino v. Curtiss Nat'l Bank of Miami Springs*, 448 F.2d 1046 (5th Cir. 1971). Under Florida law, a statutory cap is not an affirmative defense because a cap does not, wholly or partially, bar or void a cause of action. *See Lynn v. Feldmeth*, 894 So.2d 481, 483 (Fla. 2d DCA 2003). (statutory cap of motor vehicle owner's liability regarding damages caused by permissive user of vehicle is not an affirmative defense); *Cohen v. DeYoung*, 655 So.2d 1265, 1267 (Fla. 5th DCA 1995) (damages cap set forth in §766.207 and §766.208, Fla. Stat., were primarily a limitation in damages and not a defense to the suit or a condition which had to be met prior to filing suit).

Florida courts condition a plaintiff's recovery upon a jury's express finding supporting the claim. *See Globe Sec. Sys. Co. v. Mayor's Jewelers, Inc.*, 458 So.2d 828, 829-30 (Fla. 3d DCA 1984). *Ault v. Lhor*, 538 So.2d 454, 455-56 (Fla. 1989) (where the Florida Supreme Court, while addressing questions certified by the Eleventh Circuit Court of Appeals, approved an award of punitive damages "upon the express finding of liability by the fact finder"). Where a statute requires specific findings, the verdict form must contain these findings. *See Cabas-Torres v. State*, 502 So.2d 67, 68 (Fla. 3d DCA 1987) (holding that a verdict failing to contain specific findings could not support the trial court's statutory

reclassification). The statute does not permit these findings to be inferred – the statute requires that these findings be expressly made.

The District Court noted that it first had to "determine whether the jury's verdict is within the confines set by state law." (App. 98a) (citing to *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435 (1996) (quoting *Kelco Disposal, Inc.*, *supra* at 279)).

The Court made the obvious finding dictated by the record that the jury did not make the requisite findings under §768.73(1)(c) to support unlimited punitive damages, and said:

> Although Plaintiff asserts in her opposition memorandum that the jury made the requisite findings under §768.73(1)(c) to support an unlimited punitive damages award, the jury did not do so. The jury was instructed, in accordance with the Florida standard jury instruction on this issue that it should *consider* whether [CFI's CEO] "had a specific intent to harm the Plaintiff and [whether] the conduct of [CFI's CEO] did in fact harm the Plaintiff" (Doc. 232, p. 24), but the verdict form does not indicate that the jury made either of these findings. Absent such findings, under the plain terms of the statute, the award is subject to the cap in §768,73(1)(a) --

> $500,000. (alteration in original). (App. 111a, 112a).

The Court also expressly found that Plaintiff's counsel did not object to the verdict form with regard to punitive damages, and that the verdict form Plaintiff herself proposed before trial (Doc. 207) did not ask the jury to make these findings. (App. 112a). Plaintiff clearly failed to enable the jury's ability to award uncapped punitive damages. *See Therrell v. Ga. Marble Holdings Corp.*, 960 F.2d 1555 (11th Cir. 1992) (affirming district court where neither party demanded that the statute of limitations issue be presented to the jury. They, therefore, consented to the court acting as trier of fact on this issue, and the court ruled on the issue as a trier of fact). When the District Court rejected Plaintiff's claim to uncapped punitive damages in the absence of these findings, it did nothing more than apply a plainly written Florida statute. *Id.*

The Eleventh Circuit agreed that the jury unquestionably did not make any such overt factual findings as none of the eight questions on the verdict form addressed specific intent to harm or actual harm. (App. 33a n.6, 34a). There was "no natural reading of the verdict alongside the jury instructions" that yielded the conclusion that the jury made the requisite findings. (App. 35a). The instructions made clear a civil battery might be supported where Defendants had specific intent to ***offend***, not harm, and where Defendants effected an ***offensive***, but not harmful, contact. *Id.* (citing to *Paul v. Holbrook*, 696 So.2d 1311, 1312 (Fla. Dist. Ct. App. 1997)). The Court observed "it can hardly

be said that the findings of specific intent to harm and actual harm inhere in a jury verdict of civil battery." (App. 35a). Plaintiff, who bore the burden of proof on the issue, never requested and the District Court never instructed the jury it must find specific intent to harm or actual harm. (App. 36a).

The District Court anticipated Plaintiff's constitutional flag-waiving, noting that because Plaintiff's punitive damages could not exceed $500,000 as a matter of state law, its decision was not a "traditional remittitur" and the Seventh Amendment right to a jury trial was not implicated by the reduction. (App. 123a n. 20) (collecting cases).

The Eleventh Circuit approved the District Court's application of the statutory cap on its own volition: "'where a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount.'" (App. 36a) (citing to *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1330 (11th Cir. 1999) (citing *New York, L.E. & W. R. Co. v. Estill*, 147 U.S. 591 (1893)); and *Kelco Disposal, Inc.*, *supra* at 279). The Eleventh Circuit ruled the Florida statute does not require a motion by the aggrieved party. §768.73(1)(a), Fla. Stat. Consequently, whether Defendants moved for application of the statutory cap was of no moment. (App. 36a).

Plaintiff cites to *Fredonia Broadcasting Co., Inc. v. RVA Co.*, 481 F.2d 781, 796 (5th Cir. 1973) "when the verdict form is silent on an issue, Rule 49 requires that findings in accord with the judgment

rendered on that issue are deemed to have been made". (Cr. Pet. p. 3). For the reasons stated in the Opinion, cited above, the Eleventh Circuit discerned no similarity between the instant case and *Fredonia*.

Next, Plaintiff contends that *Johansen* (properly cited by the Eleventh Circuit for the proposition that a court may simply modify a jury's verdict to the extent it is not permitted by law) has no application here because *Johansen* is limited to verdicts which are excessive *per se*. (Cr. Pet. p. 4). Plaintiff cites no authority for such a restrictive reading of *Johansen*. Had such a limitation been intended, the Eleventh Circuit in particular should have known of it, given that it decided *Johansen*.

Plaintiff then offers *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1289 (11th Cir. 1998) as a Seventh Amendment restraint of the modification of a jury's verdict "simply because a party has saved up its objections to the verdict to be sprung after losing." (Cr. Pet. p. 5). *Ross* is simply inapposite, as the Eleventh Circuit was surely aware given that it decided *Ross*. In *Ross*, defendant moved for judgment as a matter of law both at the close of plaintiff's case and at the close of all the evidence. *Id.* at 1289. The parties did not, however, identify on appeal what grounds defendant offered in support of its pre-verdict motions under Rule 50(a). *Id.* The District Court granted defendant's renewed motion for judgment as a matter of law, but the Eleventh Circuit reversed because the record on appeal prevented the appellate court from any meaningful review of whether plaintiff's Seventh Amendment privileges were abridged. *Id.*

The instant case is entirely different. Defendants' Motion To Dismiss; Answer and Affirmative Defenses; Motion for Summary Judgment; and Rule 50(a) Motion all expressly raised the untimeliness argument (App. 69a-71a). Plaintiff apparently chose not to put on all of her evidence regarding timeliness in her case in chief. Moreover, even after Defendants raised the timeliness argument in their Rule 50(a) Motion, Plaintiff still failed to ask the District Court to reopen the case to put on additional evidence. The *Ross* decision itself notes that this would defeat any claim that Seventh Amendment rights were "ambushed." The Court stated:

> When reviewing a trial court's resolution of a Rule 50(b) Motion, we compare the grounds originally argued by the Movant in its Rule 50(a) Motion with those cited by the trial court in granting a renewed motion for judgment as a matter of law. (citations omitted). If the grounds argued in a motion under Rule 50(a) are "closely related" to those argued in a Rule 50(b) Motion, then setting aside a jury's verdict is no surprise to the nonmovant. *No Seventh Amendment right is ambushed.* (citations omitted) (emphasis added).

As she did on appeal, Plaintiff cites to *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999) for the holding that Rule 51 requires a party to object to a jury instruction or jury verdict

form prior to jury deliberations to preserve the issue on appeal. (Cr. Pet. p. 6). For the reasons stated in the Opinion above, the Eleventh Circuit determined that, as with *Fredonia*, *Farley* did not support Plaintiff on appeal.

Plaintiff is simply dissatisfied with the Eleventh Circuit's Opinion (and the District Court's decision) and its application of the accepted legal principles to the record before it. The Seventh Amendment did not prohibit the District Court from applying the statutory cap both because Plaintiff failed to object to the instructions and verdict form and because the $5,276,640 punitive damage award was simply not permitted by law. Plaintiff's claim does not possess constitutional attributes that would justify this Court's certiorari review.

III. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT CORRECTLY CAPPED PUNITIVE DAMAGES AT $500,000, IS FURTHER SUPPORTED UNDER A FEDERAL DUE PROCESS ANALYSIS.

Even without considering either Florida's statutory punitive damages cap (the legality of which has not been effectively demonstrated by Plaintiff) or Plaintiff's unprecedented claim that the District Court's application of that cap violated the Seventh Amendment, this Court should decline jurisdiction of the Cross Petition because separate and distinct federal due process considerations prohibit punitive damages in excess of $500,000.

While states may legislate restraints over the imposition of punitive damages, there are, beyond the statutory scheme, procedural and substantive constitutional limits in punitive damages. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). The amount of punitive damages may not exceed the *lowest* amount reasonably necessary to achieve retribution and deterrence. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416-20 (2003).

The foundation of the due process inquiry for punitive damages is found in *BMW*, which established three "guideposts" to determine when an award is appropriate or grossly excessive. These three guideposts are: "the degree of reprehensibility"[2] of the Defendants' actions; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW* at 574-75.

To determine the wrongdoer's reprehensibility a court must consider whether: (1) the harm was physical or economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the

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[2] The reprehensibility required for harsh punitive damages entails a high degree of culpability. *BMW*, *supra*, at 580. The Court implied (as in *TXO*) the misconduct should be intentional, perhaps gravely deplorable, deserving the harshest punitive damages would be odious. It would pass moral bounds, be wicked or outrageous, and constitute a grave offense against right or decency, which two instances of battery alone do not support.

health or safety of others; (3) the target had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm resulted from intentional malice, trickery or deceit, or mere accident. *State Farm*, 538 U.S. at 419.

"Elementary notions of fairness enshrined in our constitutional jurisprudence, dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574; *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (there is a "potentially greater deprivation of the right to fair notice . . . where . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness situation'").

A key procedural mechanism for ensuring notice, and concomitantly for protecting against severe punishments, is the limitations period for a claim. Statutes of limitations

> promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared . . . *even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.*

Order of R.R. Tele. v. Ry. Express Agency, Inc., 321 U.S. 342 (1944) (emphasis added).

Defendants have already argued in their July 2, 2010 Petition for Writ of Certiorari, that even the statutorily capped punitive damages of $500,000 were constitutionally excessive. Subsumed within that argument is the more obvious argument that punitive damages could not have exceeded $500,000 under a federal due process analysis.

Because the statute of limitations under Title VII and the Florida Civil Rights Act ("FCRA") barred Plaintiff's claim, the jury did not reach the issue of damages on her sexual harassment claims. Evidence introduced at trial relating to Plaintiff's time-barred statutory sexual harassment claims, however, infected the jury's deliberations and ultimately influenced the amount of punitive damages awarded on her common law battery claim. That same time-barred evidence precipitated the already unconstitutionally excessive $500,000 award. Punitive damages should never have even approached $500,000 because that sum necessarily, and impermissibly, included punitive damages based on conduct which was separate from the two acts the jury concluded were a battery and were not actionable.

In *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 477-78 (3d Cir. 1997), the Third Circuit ruled that the presence of a time-barred claim and the introduction of evidence related to and supporting it "infected" the jury's verdicts on liability on the other timely claims and on the damages

award. *Id.* at 484-85. The Court explained that it had:

> no intention of shredding the 300-day limitations period by automatically allowing an employee who alleges actionable conduct . . . to make claims with respect to any adverse employment actions that occurred during his or her entire period of employment.

Id. On this reasoning, the *Rush* Court concluded that when "[i]t is not possible to ascertain what portions of the compensatory and punitive damages awards were attributable" to claims that were time-barred, the damages awards must be vacated. *Id.*

The Second Circuit in *Annis v. County of Westchester*, 136 F.3d 239 (2d Cir. 1998) followed *Rush* and vacated a punitive damages award in a sex discrimination suit. The Court explained that jury confusion and prejudice to the defendants far outweighed the probative value of the time-barred evidence of sexual harassment. The Second Circuit held that if a court cannot determine what portion of a punitive damages award is attributable to time-barred claims, the damages awards must be vacated. *Id.* at 248.

The District Court concluded that the entirety of Siegel's conduct – not just the battery actually proven – was at the "low to middle range of the reprehensibility scale." (App. 115a). Plaintiff was never treated for any physical or emotional injuries

as a result of the battery. There was no evidence that Defendants' conduct evinced an indifference or reckless disregard of Plaintiff's *physical health* or safety. The non-time-barred evidence of the battery consisted of two incidents lasting a few seconds. No clear and convincing evidence proved that such conduct demonstrated a high probability that an actual injury to Plaintiff would result.

The *State Farm* factors make clear that a heightened award was not justified. *See State Farm*, 538 U.S. at 419 (the presence of a single factor involved in the reprehensibility analysis may not warrant punitive damages); *Bridgeport Music, Inc. v. Justin Combs Publ'g.*, 507 F.3d 470, 487 (6th Cir. 2007) ("where only one of the reprehensible factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow"); *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 191-92 (3d Cir. 2007) (punitive damages award reduced in part because harm was economic and only three reprehensibility factors were present); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 155-57 (6th Cir. 2007) (reducing $2.2 million punitive damages award to $400,000, the amount of the compensatory damages award, where only one reprehensibility factor present); *Clark v. Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (reducing $3 million punitive damages award to $471,258.26, an amount twice the compensatory award, where the defendant's conduct was not highly reprehensible).

As the Eleventh Circuit's noted, due process prevented Plaintiff from recovering more than $500,000 even without considering Florida's

statutory punitive damages cap. The Eleventh Circuit refused to award Plaintiff more than $500,000 for punitive damages, even after the Eleventh Circuit went beyond the procedural and substantive limitation *BMW* and *State Farm* place on punitive damages awards.

Moreover, as Defendants have argued in their Petition for Writ of Certiorari, the $500,000 punitive damage award also ran afoul of *BMW* and *State Farm* because the punitive damages to compensatory damages ratio of nearly 5:1 exceeds constitutional bounds.

In *State Farm*, this Court significantly redefined the conduct that a state may subject to punitive damages liability, and pointedly clarified the rigorous three-guidepost analysis the Court established in *BMW*, offering highly structured guidance on the outer limits of punitive damages awards. *State Farm*, 538 U.S. 408. In *BMW*, the Court made clear that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." *BMW*, 517 U.S. at 580. *State Farm* went one step further and made clear that "the conduct must have a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422. The second *BMW* guidepost, therefore, focuses a court's analysis on that nexus, on the "relationship between the penalty and the harm to the victim caused by the Defendants' actions," *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001).

The "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* Although this Court in *TXO* upheld a punitive award where "the relevant ratio was not more than 10 to 1," *BMW*, 517 U.S. at 581 the Court also has stated that a punitive damage award of four times the amount of compensatory damages (4 to 1) is "close to the line" in terms of constitutional propriety. *Id.*

The punitive damages award here is already beyond the line. At an unreasonable or excessive ratio of nearly 5 to 1, the award does not reflect the actual harm occasioned by just two incidents of battery in a 117-day period. After all, the compensatory damages award did not redress the type of physical harm ordinarily suffered in a battery, as Plaintiff suffered none. The compensatory damage award was, as the Eleventh Circuit described it, an "award for emotional damages equal to" Plaintiff's annual income. (App. 22a, 23a). While there is no formulaic approach to computing such damages, it is inconceivable that the "emotional harm, emotional damages and emotional suffering" Plaintiff endured as the result of just two incidents of battery comprising, at best, a few seconds of contact caused $102,223.14 in harm.

There is little doubt that for the harm occasioned by the two instances of battery, the compensatory damages are substantial. *See, e.g., Bach, supra,* at 156-57 (holding $400,000 compensatory damage award was "substantial" and remitting $2.2 million punitive damage award to

$400,000). In cases involving only slight physical touching, compensatory damages have ranged from $0 to $35,000.[3] In cases involving emotional distress which resulted from conduct that did not cause physical injury, compensatory damages have ranged from $5,000 to $75,000. These cases, in contrast to this case, presented documented and corroborated emotional injury or psychological harm. Even then awards have been modest.[4]

In *State Farm*, this Court said "an application of the *BMW* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (which already contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *State Farm*, *supra*, at 429. Explaining further:

> The compensatory damages for the injury suffered here, moreover, likely were based on a component which was *duplicated in the punitive award. Much of the distress was caused by the outrage*

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[3] *See Phillips v. Smalley Maintenance Serv., Inc.*, 711 F.2d 1524 (11th Cir. 1983); *Rainone v. Potter*, 388 F. Supp. 2d 120 (E.D. N.Y. 2005); *Wilson v. Taco Bell of Am.*, 917 So.2d 1223 (La. Ct. App. 2005); *Walia v. Vivek Purmasir & Assoc., Inc.*, 160 F. Supp. 2d 380 (E.D. N.Y. 2000); and *Beard v. Flying J., Inc.*, 266 F.3d 792 (8th Cir. 2001).

[4] *See Franceschi v. Hosp. Gen. San Carlos, Inc.*, 326 F. Supp. 2d 257 (D. P.R. 2004); *Reiter v. Metropolitan Transp. Auth. of New York*, 2003 WL 22271223, at *11 (S.D. N.Y. 2003); *Rainone*, *supra*, at 124-26; *and Bernstein v. Sephora*, 182 F. Supp. 2d 1214, 1226-29 (S.D. Fla. 2002).

> *and humiliation the Campbell's suffered at the actions of their insurer;* and it is major role of punitive damages to condemn such conduct. *Compensatory damages, however, already contain this punitive element. See* Restatement (Second) of Torts §908, Comment c, p. 466 (1977) ("*In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both*"). (emphasis supplied).

Id. at 426. Given the attenuated nexus between Defendants' conduct and the harm Plaintiff actually suffered, the ratio (between the compensatory and punitive damages) is excessive and should not have exceeded a ratio of 1:1. Under no analysis could it be said that the 4.89:1 ratio here should have been exceeded. This Court should accordingly decline to accept jurisdiction because federal due process considerations prohibit a punitive damages award in excess of $500,000 notwithstanding all of Plaintiff's arguments.

IV. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT DID NOT ABUSE ITS SOUND DISCRETION BY FINDING THAT DEFENDANTS' AFFIRMATIVE DEFENSES WERE SUFFICIENTLY PARTICULAR IN DENYING THE TIMELINESS OF PLAINTIFF'S EEOC COMPLAINT, DID NOT VIOLATE THE SEVENTH AMENDMENT OR RUN AFOUL OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiff next claims that the Eleventh Circuit erred in allowing a "statute of limitations" question on the verdict form. (Cr. Pet. p. 6-9). At its bottom, Plaintiff's argument is that the District Court abused its sound discretion in finding that Defendants' affirmative defenses were sufficiently particular in denying the timeliness of Plaintiff's EEOC complaint. This point inappropriately seeks an academic opinion from this Court, proclaiming, without discernible reason, the District Court's factual findings as erroneous and both lower courts' application of correctly stated principles of law to those facts as wrong.

In *Wright v. Hollingsworth's Lessee*, 26 U.S. 165, 167 (1828), this Court held:

> The allowances and refusal of amendments in the pleadings – the granting and refusing new trials; and most of the other incidental orders, made in the progress of a cause, before trial, are matters *so peculiarly*

> *addressed to the sound discretion of the Courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This Court has always declined interfering in such case.* (emphasis added).

The filing of a complaint with the EEOC is a condition precedent to a sexual harassment suit. (App. 52a) (citing to *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001); and 42 U.S.C. §2000e-5(b) (App. 52a)). "In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity." (App. 52a) (citing to Rule 9(c), Fed.R.Civ.P.). If a defendant makes that denial, "[t]he plaintiff then bears the burden of proving that the conditions precedent, which the Defendant has specifically joined in issue, have been satisfied." (App. 52a) (citing to *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1010 (11th Cir. 1982)).

Plaintiffs Second Amended Complaint (¶ 9) alleged: "Plaintiff received her Notice of Right to Sue letter from the U.S. Equal Employment Opportunity Commission within 90 days before filing this action, and has otherwise fulfilled all conditions precedent to institution of this action." (App. 53a).

Defendants first directly denied Plaintiffs' satisfaction of conditions precedent: "Defendants deny the allegations contained in paragraph 9 of the

Plaintiff's Second Amended Complaint." (App. 54a). Defendants then amplified such denial in their affirmative defenses:

> 338. Plaintiff failed to exhaust all administrative remedies and thus cannot obtain relief pursuant to Title VII or the Florida Civil Rights Act, Chapter 760.
>
> 339. Plaintiff did not exercise her right to sue or to file her EEOC Complaint within the time prescribed by the statute.

(App. 52a). The Eleventh Circuit ruled the affirmative defenses stated which particular condition precedent Defendants claimed Plaintiff failed to fulfill (the EEOC complaint), and the reason for the failure (untimeliness). (App. 55a). Consequently, the Eleventh Circuit ruled that CFI's denial was sufficiently particular. *Id.*

Technical noncompliance with pleading requirements are excused where the substance of the pleading is sufficient. (App. 55a) (citing to *In re: Rawson Food Svs., Inc.*, 846 F.2d 1343, 1349 n.9 (11th Cir. 1988); and *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)). The Eleventh Circuit found that Defendants' Answer gave Plaintiff ample notice that Defendants believed Plaintiff had failed to timely file a complaint with the EEOC, which notice served to discharge Defendants' duty under Rule 9(c) and successfully shifted to Plaintiff

the burden of presenting evidence of timeliness, which she failed to do. (App. 55a).

Plaintiff cites to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) for the straightforward proposition that "factual [averments] must be enough to raise a right to relief above the speculative level . . . '[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right.'" (internal citation omitted). (Cr. Pet. p. 8). The Eleventh Circuit's ruling is in complete accord with *Twombly* and *Ashcroft v. Igbal*, 129 S. Ct. 1937, 1953 (2009) (Cr. Pet. p. 8).

The omniscience with which Plaintiff cloaks herself peaks with her wild claim that the Eleventh Circuit once again misread another of its own cases: *In re Rawson Food Svs., Inc., supra.* Defendants, in contrast, accord the Eleventh Circuit the respect it is due; we presume that the Eleventh Circuit knew what its opinion, and the following language, meant: "the defense Rawson raises is not an affirmative defense, but rather is a general defense akin to a Fed.R.Civ.P. 12(b)(6) motion for failure to state a claim upon which relief can be granted. Despite the mislabeling of the defense, its substance correctly points to a fatal flaw in Flav-O-Rich's claim – the failure to allege possession." Defendants' pleading, quoted supra, is to be similarly viewed. *In re Rawson* could hardly be more clear or on point.

Plaintiff claims that this Court should accept certiorari review because the Eleventh Circuit's Opinion permits Defendants to "sandbag an

unsuspecting plaintiff into failing to meet a burden of proof by claiming that burden as Defendants' own and then shrugging it off later." (Cr. Pet. p. 7). Not only is Plaintiff's interpretation of the facts belied by the District Court's findings, Plaintiff offers not one case to support this argument. Plaintiff also argues the Eleventh Circuit "made new law that does not square with the pleading rules nor this Court's insistence upon taking them seriously." (Cr. Pet. p. 9). Again, Plaintiff fails to cite to a single case, nor does she articulate precisely what the "old" law that the Eleventh Circuit purportedly ignores is. There is no basis for this Court's certiorari review.

V. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT DID NOT ABUSE ITS "CONSIDERABLE DISCRETION" BY PROHIBITING PLAINTIFF FROM INTRODUCING EVIDENCE ON REBUTTAL WHICH DID NOT "EXPLAIN, REPEL, CONTRAST, NOR DISPROVE" TESTIMONY OFFERED BY DEFENDANTS' WITNESSES, DID NOT VIOLATE THE SEVENTH AMENDMENT.

Plaintiff next argues the Seventh Amendment required the Eleventh Circuit to let her rebut Defendants' Rule 50(a) Motion. (Cr. Pet. p. 10). This is yet another garden variety issue, upon which this Court has traditionally declined to interfere, dressed up as a constitutional violation. Since the Eleventh Circuit merely affirmed the District Court's "considerable discretion" in prohibiting evidence on rebuttal, this Court should decline jurisdiction. *See Wright*, 26 U.S. at 167 (incidental orders "are so

peculiarly addressed to the sound discretion of the Courts of original jurisdiction as to be fit for their decision only"). Plaintiff's argument has even more fundamental flaws, which a summary of the proceedings below reveals.

Plaintiff filed her complaint with the EEOC on September 14, 2001. Consequently, Defendants could only have been held liable for sexual harassment that had occurred on or after September 15, 2000, under the FCRA, *see* §760.11(a), Fla. Stat., and on or after November 19, 2000, under Title VII. (App. 51a) (citing to 42 U.S.C. §2000e-5(e); *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1101 (11th Cir. 2002)).

The District Court found Defendants had alleged Plaintiff's failure to timely file at Defendants' first opportunity and maintained that position throughout the case, through trial, plainly putting timely filing at issue and placing the burden on Plaintiff. (App. 69a). As set forth above, Plaintiff pled fulfillment of conditions precedent. *Id.* Defendants denied that and responded that "Plaintiff did not exercise her right to sue or to file her EEOC complaint within the time prescribed by the statute." (App. 54a). Defendants also alleged "Plaintiff failed to exhaust all administrative remedies and, thus, cannot obtain relief pursuant to Title VII or the FCRA, Chapter 760"; (App. 54a). Defendants raised an untimeliness argument in a motion to dismiss and in its summary judgment motion (App. 70a). Although Defendants consistently and repeatedly raised untimeliness in

each of the foregoing filings, Plaintiff still fell short, in her case in chief, to put on evidence of timeliness.

After Plaintiff rested her case in chief, Defendants moved *ore tenus* under Rule 50, Fed.R.Civ.P. on the issue of whether any of the events described by Plaintiff or her witnesses occurred within the 365 days prior to the filing of her administrative charge. (App. 71a; 71a n.3). Plaintiff never moved to reopen her direct case to introduce additional evidence on timeliness after resting in her case in chief, which she clearly was permitted to do subject to the District Court's discretion. *See Chevy Chase Dairy v. Mullineaux*, 71 F.2d 985 (C.A. D.C. 1934). The District Court reserved ruling on the motion (App. 72a), and the trial continued with Defendants' presentation of their case. After Defendant rested, Plaintiff made a "partial Rule 50 motion" regarding the timeliness issue. *Id.* Plaintiff contended Defendants had rested "without raising anything in support of its affirmative defense of a lack of activity within the statute of limitations time period." *Id.*

In their Rule 50(a) motions, Defendants maintained it was Plaintiff's burden to prove when the act(s) supporting her battery claim occurred and whether she had "instituted the administrative process in a timely fashion" regarding her Title VII claim. Defendants aptly portrayed Plaintiff's efforts as improperly obliging Defendants to "prove a negative", *i.e.* that none of the alleged events of harassment occurred within the statutory period, when Defendants had, from the inception of the litigation, denied that such acts occurred at all.

Defendants reiterated that Plaintiff had not presented any evidence of events happening within the requisite time period toward the end of her employment. (App. 73a). The District Court reserved ruling on the "statute of limitations argument." *Id.*

In Plaintiff's rebuttal case, her counsel questioned Plaintiff regarding the testimony of a witness, Kelly Oehrle, who had testified during Plaintiff's direct case. *Id.* The District Court then defined the scope of Plaintiff's proper rebuttal to factual matters raised by Defendants in their case in chief. The Court admonished Plaintiff's counsel that the scope of rebuttal was not to rehash Plaintiff's case in chief. (App. 73a, n.4; 74a).

During the charge conference held at the conclusion of the trial testimony, Plaintiff's counsel complained he had wanted to "tighten up the statute of limitations problem in rebuttal" but "was not allowed to because it wasn't responsive to anything that happened in the defense." (App. 74a). This was code for Plaintiff's novel propositions that "rebuttal" means something other than the word's accepted definition and that the evidence needed to prove the matters on which Plaintiff carries the burden of proof could somehow be introduced in part in her case in chief and in part on rebuttal. Any such notion has no support under the law. To the contrary, if a plaintiff could divide the evidence the way Plaintiff suggests, a defendant would not be assured of its ***right*** to respond to prima facie evidence a plaintiff chose to introduce in rebuttal, because the admission of sur-rebuttal evidence is

discretionary. *See Cason-Merenda v. Detroit Medical Center*, 2010 WL 1286410 (Slip Opinion) (E.D. Mich.) (denying defendant's motion for leave to file a sur-rebuttal expert report).

The District Court concluded it "did not preclude anyone from presenting evidence pertaining to the time that events occurred, and abundant evidence was presented regarding when things happened or did not happen." (App. 76a). Plaintiff acknowledges, as she must, that she did "put on some evidence showing sexual harassment clearly within the stated limitations period. Obviously, the jury did not credit that evidence." (Cr. Pet. p. 10, 11).

Consequently, Plaintiff's Seventh Amendment rights were not violated. She had the burden of proving timeliness in her case in chief. This she did not do. Moreover, Plaintiff was even permitted to, and did, introduce additional timeliness evidence on rebuttal. The District Court ruling was not only within its discretion, but any such ruling caused no harm to Plaintiff. *See United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004) (*en banc*) (where the substance of the excluded evidence was admitted by other means or the contrary evidence supported the opposing party's position, the district court's evidentiary decision excluding evidence is harmless error).

The Eleventh Circuit ruled the District Court did not abuse its "considerable discretion" limiting Plaintiff's rebuttal case. (App. 55a). "The trial judge has the authority, within limits, to control the scope

of rebuttal testimony." *Id.* (citing to *United States v. Renfro*, 620 F.2d 497, 502 (5th Cir. 1980) (citing *Geders v. United States*, 425 U.S. 80, 86 (1976))). The Eleventh Circuit found Plaintiff presented little testimony during her case in chief concerning when the complained-of behavior occurred. (App. 51a). Her witnesses did not state clearly when any harassing conduct had occurred, or if any had occurred after September 15, 2000. *Id.* Defendants put on no evidence regarding when the events described by Plaintiff's witnesses purportedly occurred. *Id.* The Eleventh Circuit concluded Plaintiff's attempted rebuttal could not "explain, repel, counteract, [n]or disprove" the testimony offered by defense witnesses (App. 56a) (citing to *cf. United States v. Mock*, 523 F.3d 1299, 1303 (11th Cir. 2008) (quoting *Frazier*, *supra* at 1269)); and that there was no evidence to rebut. (App. 56a).

Plaintiff again cites to *Ross* for the proposition that the Seventh Amendment was designed to cure evidentiary deficiencies before cases go to the jury. (Cr. Pet. p. 10). However, as shown above, *Ross* is wholly distinguishable. *Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151, 1153 (11th Cir. 1994) also cited by Plaintiff (Cr. Pet. p. 10) is distinguishable for the even more obvious reason that in *Crawford*, the district court *sua sponte* set aside plaintiff's verdict for insufficient evidence even though defendant never even moved for a directed verdict either prior to the submission of the case to the jury or even after the jury returned a verdict against defendant. *Id.* at 1154. In her appeal, Plaintiff cited to both of these cases. The Eleventh

Circuit discerned no similarity between these cases and the present case.

Plaintiff also complains that one "possibility" for the jury's failure to credit Plaintiff's evidence of timeliness is "there just was not enough of the evidence." (Cr. Pet. p. 11). Plaintiff's wild speculation is not a sound reason to grant the petition. In the end, the District Court did not abuse its "considerable discretion" in its ruling. Plaintiff was not ambushed – she simply made a miscalculation at trial.

Plaintiff claims that her Cross Petition seeks certiorari to seek prevailing party status and, thus, eligibility for fees on the statutory claims. (Cr. Pet. p. 3). Plaintiff inappropriately wheels this point out for a third time. The Court should refuse to consider this stealth point.

First, it consists of an argument wholly manufactured from Plaintiff's imagination.

Second, Sup. Ct. R. 14.1(a) provides in pertinent part: "*Only the questions set out in the petition, or fairly included therein, will be considered by the Court.*" (emphasis added). Sup. Ct. R. 10. Plaintiff has failed to argue entitlement to fees as a separate distinct basis for granting the writ. The only place Plaintiff even addresses this is in an after-thought at the end of Point IV where Plaintiff asserts that "*had* [she] been allowed to add more examples of sexual harassment after September 15, 2000 . . . that *might* have persuaded the judge to eliminate the limitations question from the verdict

form" which would have entitled her to fees. (Cr. Pet. p. 11).

This argument is fundamentally flawed. Again, a summary of the proceedings below puts into context the baseless nature of Plaintiff's argument. The District Court correctly held that the issue of the timeliness of the filing of Plaintiff's administrative charge was plainly a factual matter for the jury. (App. 70a). The Court included the issue of timing in the jury instructions as to both the battery claim and the sexual harassment claims, and the verdict form asked the jury whether events constituting battery and sexual harassment occurred on or after the respective pertinent dates for these claims. (App. 75a). The jury "clearly" found for Defendants on the issue (timely administrative filing) on which Plaintiff bore the burden of proof and for Plaintiff on the issue (battery within the statute of limitations) on which Defendants bore the burden of proof. (App. 70a n.2). The District Court noted that the jury resolved the issue of whether Plaintiff's battery claim was timely in Plaintiff's favor, yet Plaintiff never challenged the submission of the battery statute of limitations issue to the jury. (App. 71a).

The District Court specifically rejected Plaintiff's claim that timeliness issues are never included in the jury instructions and ruled: "where there is an issue whether an act occurred at a certain time so as to render a claim timely under an administrative scheme or a statute of limitations, the issue is one of fact for a jury, and courts instruct juries accordingly." (App. 75a) (citing to *Weaver v.*

African Methodist Episcopal Church, 54 S.W.3d 575, 587 (Mo. Ct. App. 2001) (holding that "the issue of whether the battery occurred more than two years before the date of filing was one of fact for resolution by the jury "under the circumstances of the case); and Fla. Std. Jury Instructions in Civil Cases 3.8(g) and Verdict Form 8.9 (including special interrogatory for jury to determine statute of limitations compliance in medical malpractice cases)).

Consequently, all of the additional evidence in the world would not have made the timeliness issue any less of a question for the jury. This Court should decline jurisdiction over this speculative "comment," (for lack of a better description).

CONCLUSION

For the reasons discussed above, the Cross Petition for a Writ of Certiorari should be denied.

Respectfully submitted on behalf of David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; Westgate Resorts, Ltd.; Westgate Lakes, Inc.; and Westgate Lakes, Ltd. (collectively "CFI") this 23rd day of August 2010.

Respectfully submitted,

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